CITATION OILFIELD SUPPLY AND LEASING, LTD.
and
MURPHY OIL U.S.A., INC.
v.
ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-154-A, 92-160-A Decided March 7, 1995

Appeals from a determination that a tribal oil and gas lease had expired by its own terms because of failure to produce oil and/or gas in paying quantities.

Affirmed; recommended decision adopted in part and rejected in part.

1. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Expiration

   A lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a-396f (1988), does not expire because of a temporary shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production.

2. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Expiration

   Where a lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a-396f (1988), has been shut in due to a mechanical breakdown or accident, and it must be determined whether the operator has made repairs and resumed production within a reasonable time, a "reasonable time" is the amount of time it would take a prudent operator of the same size and type to accomplish these tasks.

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3. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Expiration

Where a lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a-396f (1988), has been shut in due to a mechanical breakdown or accident, and it must be determined whether the operator has made repairs and resumed production within a reasonable time, the determination will be based solely on actions directly related to the making of repairs and resumption of production.

APPEARANCES: Ronald A. Hodge, its President, for Citation Oilfield Supply and Leasing, Ltd.; Michael E. Webster, Esq., Billings, Montana, for Murphy Oil U.S.A., Inc.; Karan L. Dunnigan, Esq., Office of the Field Solicitor, U.S. Department of the Interior, for the Area Director; Marvin J. Sonosky, Esq., Washington, D.C., for the Assiniboine and Sioux Tribes of the Fort Peck Reservation.

OPINION BY ADMINISTRATIVE JUDGE VOGT

These are appeals from an April 8, 1992, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), finding that Fort Peck Tribal Oil and Gas Lease 14-20-0256-3646 (the lease) had expired by its own terms because of failure to produce oil and/or gas in paying quantities. The Area Director found that expiration had resulted from a shut-in of the Tribal 4-10 well, which followed a fire in the well's treater. 1/

For the reasons discussed below, the Board affirms the Area Director's decision.

Background

[1] On January 27, 1993, the Board issued a decision in these appeals, holding that a lease entered into under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1988), 2/ does not expire because of a temporary shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production. Citation Oilfield Supply & Leasing, Ltd. v. Acting Billings Area Director (Citation I), 23 IBIA 163 (1993). The Board found, however, that the record in the appeals was inadequate to determine whether production from the Tribal 4-10 well was resumed within a reasonable period of time. Therefore, it referred the matter for hearing by an Administrative Law Judge. The Board directed that the Administrative Law Judge

1/ Also known as a heater-treater, this is a unit which separates salt water and other impurities from oil. It does so by heating the oil. See 8 Williams and Meyers, Oil and Gas "Heater-treater" (1995).
2/ All further references to the United States Code are to the 1988 edition.

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take evidence and issue a recommended decision "on the questions of (1) the number of days the Tribal 4-10 well was shut in and (2) whether appellants repaired the treater and resumed production within a reasonable period of time" (23 IBIA at 172).

The case was assigned to Administrative Law Judge Harvey C. Sweitzer, who held a hearing on July 6 and 7, 1994. The parties filed post-hearing briefs, as well as proposed findings of fact and conclusions of law. Judge Sweitzer issued a recommended decision on December 13, 1994, recommending that the Area Director's decision be reversed. Pursuant to 43 CFR 4.339, all parties were given an opportunity to file exceptions or other comments concerning the recommended decision. The Assiniboine and Sioux Tribes of the Fort Peck Reservation (Tribes) filed exceptions. No other parties filed exceptions or comments.

Summary of Facts

The facts of this case are set out in the Board's earlier decision and, as further developed at the hearing, in Judge Sweitzer's recommended decision. As necessary for an understanding of this decision, they are summarized here.

Citation Oilfield Supply and Leasing, Ltd. (Citation), holds a 25 percent interest in the lease and is also the designated operator for the lease. Murphy Oil U.S.A., Inc. (Murphy), holds a 25 percent interest in the lease.

Citation is a four-person company whose President, Ronald A. Hodge, lives in Bismarck, North Dakota. In addition to the Tribal 4-10 well, Citation operated 10 other wells on the Fort Peck Reservation. It employed a pumper, William Strauser, to oversee the operation of the Tribal 4-10 well. Murphy is a larger company which operates about 65 producing wells in the Poplar and Wolf Point, Montana, areas.

The Tribal 4-10 well is the only well on the lease. Production from the well ceased on the evening of August 27, 1991, or the morning of August 28, 1991, as a result of a problem with the pump engine. On August 31, 1991, a fire occurred in the well's treater, rendering it inoperable.

Strauser informed Hodge of the fire on September 3, 1991. Strauser also informed BIA of the fire, and BIA conveyed the information to the Bureau of Land Management (BLM). Hodge failed to file a report of the fire with BLM, despite BLM regulations requiring such reports. On September 20, 1991, BLM issued Citation a "Notice of Incidents of Noncompliance," requiring that the fire be reported in writing within 15 days. On September 25, 1991, Hodge filed a report with BLM, incorrectly stating that the fire had occurred on September 14, 1991. 3/

3/ Hodge's final report on the fire, dated Nov. 27, 1991, corrected the date.

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Strauser quit his employment with Citation on September 6, 1991.

After learning of the fire, Hodge contacted Mitchell's Service in Sidney, Montana, to inspect the treater and make an estimate on repairs. Mitchell's failed to report back to Hodge, and Hodge did not follow up. Hodge also requested another company in Mandan, North Dakota, to check the treater and all of Citation's pump engines. An employee of that company checked the engines and may have looked at the treater but did not inform Hodge whether he could repair it. Again, Hodge did not follow up.

Between September 13 and September 21, 1991, Hodge contacted two Indian pumpers concerning possible employment with Citation. Neither was available for employment at that time.

On September 20 or 21, 1991, Hodge received a letter from BLM suggesting that a new operator be designated for the Tribal 4-10 well. Shortly after receiving the BLM letter, Hodge informed Murphy's District Manager, Ray Reede, about the problems at the well and about his difficulties in hiring a pumper.

On October 1, 1991, the Superintendent wrote to all lessees under the lease, informing them that the lease would be terminated in 30 days unless they could show cause why it should not be terminated. 4/ Upon receiving that letter, Hodge requested Murphy to repair the treater and take over operation of the well.

Murphy began repairs on October 4, 1991, and completed them on October 10, 1991. It began pumping oil and water on October 6, 1991, bypassing the still-damaged treater and pumping the oil and water mixture into a tank at the well. Following completion of the treater repairs, Murphy pumped the oil and water mixture back out of the tank and through the treater.

Murphy has been operating the well since October 1991 but has not been formally designated as operator, in part because of the pendency of this appeal. 5/

Discussion and Conclusions

Judge Sweitzer found that the Tribal 4-10 well was shut in for 39 days, from August 28, 1991, through October 5, 1991. With respect to whether the treater was repaired and production resumed within a reasonable time, he summarized his conclusions thus:

4/ The Superintendent later withdrew this letter and, on Oct. 11, 1991, issued a decision finding that the lease had expired by its own terms. The Oct. 11 decision was appealed to the Area Director, who affirmed it.

5/ Murphy's Senior Operations Engineer, Sid Campbell, stated at the hearing that another reason a new operator designation had not been filed was that Citation's interest in the lease, along with the operatorship, had been sold to another party (Tr. 90-91).

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> [T]he completion of the repairs and resumption of production was accomplished within a reasonable period of time in light of the particular circumstances of this case. Those circumstances include the absence of harm to the Tribes, the customary liberal attitude towards the effect of a temporary cessation of production, the harm to the lessees if the lease is cancelled, and Citation's lack of control over Strauser's decision to quit and the availability of a replacement pumper to oversee the repairs and the resumption of production.

(Recommended Decision at 19).

The Tribes take exception both to the number of days Judge Sweitzer found the well was shut in and to his conclusion that the length of the shut-in was reasonable.

The Tribes contend that the well was shut in for 43, rather than 39, days. Specifically, they dispute Judge Sweitzer's finding that production occurred on October 6-9, 1991.

There is no dispute that Murphy began pumping oil and water on October 6, 1991, but was unable to run the mixture through the treater until October 10, 1991, when repairs to the treater were completed. Judge Sweitzer stated:

> While this October 6th production was not merchantable because it was not run through the heater treater to separate the water from the oil, it still constitutes production in paying quantities because it was run through the heater treater on October 10, 1991, when the heater treater repairs were completed. Whether or not the production was run through a heater treater on October 6, 1991, it would have still taken several days before the production was ready for sale. Production is not ready for sale until the tank is full and the production reports show that the tank number 1 was still receiving production up through October 9, 1991. Therefore, the fact that the October 6th production was not immediately run through a heater treater is immaterial.

(Recommended Decision at 12).

The Tribes contend that, in order for there to be production "in paying quantities" within the meaning of 25 U.S.C. § 396a, 6/ the production must be merchantable. Therefore it was error, in the Tribes' view, for Judge Sweitzer to find that production resumed on October 6, 1991, because the

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6/ 25 U.S.C. § 396a provides:

"On and after May 11, 1938, unallotted land within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction * * * may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities."

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raw production from, the period October 6-9, 1991, was not made merchantable until October 10, 1991.

The question presented by the Tribes' contention is whether production of oil is accomplished when the oil is pumped out of the ground or whether it is not accomplished until the oil has been treated to put it into marketable condition. The fact that production is required to be "in paying quantities" does not appear to answer the question because it relates to the amount, rather than the time, of production.

The term "production" has a number of meanings. In the words of one Federal court of appeals, it is a "horse of many colors" which "has confounded the courts, as well as the Secretary [of the Interior] in the past." Diamond Shamrock Exploration Co. v. Hodel, 853 F.2d 1159, 1165 (5th Cir. 1988). That court went on to state: "In the interests of consistency, logic and economics, this court adopts as the legal definition of the word 'production,' as used in the context of calculating royalty payments, the actual physical severance of minerals from the formation" (853 F.2d at 1168). Comparable definitions have been used by other courts. See, e.g., 853 F.2d at 1168 n.39; 8 Williams and Meyers, supra, "Production." Under the "merchantable condition rule," applicable to certain gas production, "production" for royalty valuation purposes may mean "gas conditioned for market." Mesa Operating Limited Partners v. U.S. Department of the Interior, 931 F.2d 318, 325 (5th Cir. 1991), cert. denied, 112 S.Ct. 934 (1992). See also ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, 23 IBIA 228, 233 n.3 (1993). The Board is not aware of any comparable rule for oil production. 7/

The Board finds that, for purposes of the issues in this case, the most reasonable conclusion is that production was accomplished when the oil and water mixture was pumped from the well. Therefore, the Board adopts Judge Sweitzer's finding that the Tribal 4-10 well was shut in for 39 days.

The Tribes take exception to Judge Sweitzer's second conclusion--that production from the Tribal 4-10 well was resumed within a reasonable period of time--on the grounds that the Judge (1) substituted his judgment for that of the BIA and BLM officials who were familiar with Citation; (2) failed to give proper weight to testimony concerning the amount of time necessary to repair a treater; (3) failed to consider the fact that Citation was an imprudent, unreliable, and financially incapable operator; (4) improperly concluded there was no harm to the Tribes; (5) improperly considered the harm to the lessees resulting from a finding that the lease had expired; (6) improperly invoked "the customary liberal attitude" concerning the effect of a cessation of production; (7) improperly considered Citation's

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2/ The Minerals Management Service regulations concerning Federal and Indian oil royalties appear to contemplate that oil might be measured prior to separation of oil and water as long as mathematical corrections are made. See 30 CFR 202.101: "When reporting oil volumes for royalty purposes, corrections must have been made for Basic Sediment and Water (BS&W) and other impurities."

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lack of control over its pumper as a matter relating to the reasonableness of the time taken to repair the treater; and (8) disregarded the plain language of 25 U.S.C. § 396a.

Judge Sweitzer correctly noted that the reasonableness of the time taken to resume production after a mechanical breakdown normally depends upon the particular facts of the case at hand. E.g., Cobb v. Natural Gas Pipeline Co., 897 F.2d 1307, 1309 (5th Cir. 1990); Hemingway, Law of Oil and Gas 299 (2d ed. 1983). In the most obvious example, the nature and extent of the breakdown are clearly important considerations. What would be a reasonable amount of time to repair a minor problem might well be totally inadequate to repair a major one. In this case, therefore, the logical first question is: "What is a reasonable amount of time in which to repair a treater following a fire?"

Testimony on this point was given by Bill Strauser, Citation's former pumper; Sid Campbell, Murphy's Senior Operations Engineer; Ray Reede, Murphy's District Manager; and John Bramhall, BLM's Supervisory Petroleum Engineering Technician with responsibility for supervising oil and gas operations on the Fort Peck Reservation.

Strauser testified that, 3 or 4 months prior to the fire in the treater at the Tribal 4-10 well, a treater at another well operated by Citation had required repair. He further testified that, in that case, a roustabout company was contacted, arrived at the well the next morning, and completed the repairs in 8 hours (Tr. 191-92).

Campbell testified that the amount of time it would take to repair a treater could vary depending on economics, time, location, and the nature of the operator and its working relationships with others. With respect to the treater at the Tribal 4-10 well, he testified that Murphy, once it had been contacted by Citation, completed the repairs in 5-6 days. He further testified that the repair crew did not spend the entire 5-6 days working on the treater, but came and went, possibly also working on other repair projects for Murphy during the same period (Tr. 123-30).

Reede testified that the repairs were initiated on October 4 and completed on October 10, 1991. He stated that repairs of this nature should take only a day or two once the repair equipment is on the scene. He acknowledged that, had Murphy been the operator in this case, it would have been unreasonable for repairs to have taken as long as they did (Tr. 150-56).

Bramhall testified that repairs such as those in this case should take no more than 3 days. He also testified that he had formerly been employed as a roustabout and had experience in treater repair (Tr. 270, 281).

Judge Sweitzer gave consideration to the testimony concerning the amount of time necessary for actual repair. However, he found that "[m]ore material to the consideration here is the testimony that the amount of time varies depending upon economics, the time and place of the breakdown,

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the availability of supervisory personnel, repair personnel, parts, and supplies, etc." (Recommended Decision at 9).

The Board agrees that some of these factors might increase the amount of time needed to complete repairs without making that amount of time unreasonable. If, for instance, repairs could not be made immediately because roustabout companies in the area were busy at the time, it would seem to be reasonable to allow for some delay in repairs. The Board also recognizes that a small operator might lack the connections and resources necessary to effect repairs as quickly as a larger company such as Murphy. 8/ However, the Board must also consider the fact that, according to Strauser's testimony, Citation was able to obtain the immediate services of a roustabout company 3 or 4 months prior to the events in this case.

[2] While some allowances for differences in circumstances may be made in determining reasonableness of repair time, there is clearly a limit. The Tribes contend that the recommended decision is based on the premise that a "'reasonable' time depends upon what is reasonable for the particular operator" (Tribes' Exceptions at 12). If that was indeed the premise of Judge Sweitzer's decision, the Board would reject it. Such a test would mean that an imprudent operator's repair efforts would be judged only by the operator's own imprudent practices. The standard must be higher. The Board finds that a "reasonable time" for an operator to make repairs and resume production is the amount of time it would take a prudent operator of the same size and type to accomplish these tasks.

One of the "circumstances" present in this case was the economic condition of Citation, and one reason for Citation's inability to hire a roustabout company in September 1991 was that it owed the local companies money. Hodge testified: "[W]e owed Richard's Roustabout money at that time, and it was going to be difficult to get a quote from them. We owed other people on the reservation money, and it was going to be difficult to get quotes from those people" (Tr. 40); "I could not hire Richard's Roustabout because I owed a debt to Richard's Roustabout" (Tr. 69). There was also testimony from others concerning the financial condition of Citation. 9/

8/ Testimony on this point was conflicting. Although Campbell and Reede testified that a small operator would probably not be able to arrange for repairs as quickly as a larger operator like Murphy, Bramhall emphatically disagreed (Tr. 318-19).

9/ Bramhall testified that all of Citation's leases were in a nonproducing status. He continued:

"Mr. Hodge and Citation had had a history of as everything started going bad, it was kind of left to a back burner, and something else always took precedence.

"I had several contacts with Mr. Hodge during this time, and his words to me was 'I would fix it if I could,' 'I don't have any money, I can't.'

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Judge Sweitzer acknowledged that "Citation had trouble locating a qualified contractor because of Citation's poor business reputation in the community, i.e., it was indebted to several businesses on the reservation" (Recommended Decision at 17). However, he found that "Citation claimed and established at the hearing that the repair of the heater treater was delayed primarily because it had trouble finding an Indian pumper to oversee its day-to-day field operations." Id.

Hodge's testimony indicated that he initiated but did not pursue efforts to engage repair personnel. According to his testimony, be abandoned these efforts because he needed to hire a pumper to replace Strauser (Tr. 40, 57-58). He testified that he considered the presence of a pumper necessary before repairs could be made because, in Citation's operations, the pumper is the onsite supervisor and has responsibility for supervising repairs (Tr. 69-71, 82). 10/

With respect to his attempts to hire a pumper, Hodge testified that he contacted two Indian pumpers and that neither could work for him, because one was an employee of Murphy and the other had personal matters that required him to be away from the reservation (Tr. 41-43). He also testified that he spoke to the second of the two pumpers on September 21, 1991; that, at about the same time, i.e., on September 20 or 21, 1991, he informed Murphy that he was having problems hiring a pumper; and that, on October 1 or 2, 1991, he asked Murphy to take over operation of the Tribal 4-10 well (Tr. 43-45).

Judge Sweitzer stated:

> The lack of activity on Hodge's part from September 21, 1991, to October 3, 1991, is somewhat troubling. This inactivity may be explained, at least in part, by Hodge's stated expectation that he would receive some inquiry or repair deadline from

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fn. 9 (continued)

"Mr. Hodge had basically extended his ability to operate prudently. I don't think it was a matter of that he did not want to; he simply could not afford to" (Tr. 279).

"Mr. Hodge * * * was always a little late with everything that he performed because he had problems getting people to respond to his requests" (Tr. 284).

"Mr. Hodge and Citation had had a history of bad things going wrong all of the time * * * Mr. Hodge had been identified as unable to fix a lot of things, and as each well went down, they were not brought back up in a timely fashion because he could not afford to do that" (Tr. 302).

10/ Hodge testified that the duties of a pumper vary according to the size of the oil company for which the pumper works. Because Citation is a small company, he indicated, "the pumper for Citation is more like the superintendent * * * and the pumper combined. He has a multiple task, and he is the only eyes that I have for the field" (Tr. 82).

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> BLM. It is unclear whether Hodge was still having discussions with [the second prospective pumper] during this period, as the record only indicates that his discussions with [the pumper] began on September 21st. Hodge did act promptly upon receipt of the Superintendent's October 1, 1991, letter, arranging for Murphy to make the repairs.

(Recommended Decision at 18).

As Judge Sweitzer stated, Hodge appears to have assumed that BLM would contact him and impose a deadline for repair of the treater. Hodge's testimony also indicates that he realized he would ultimately have to ask Murphy to repair the treater. 11/ His testimony on these points, together with the fact that he did in fact ask Murphy to make the repairs after the Superintendent issued his October 1, 1991, letter, suggest that Hodge believed there was no particular urgency in completing repairs and resuming production until BLM directed him to do so 12/ or, perhaps, until some specified amount of time had elapsed after the fire. 13/

To the extent Citation failed to make a diligent effort to repair the treater because it was waiting for BLM to give it a deadline, the

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11/ Hodge testified that, with respect to other wells he operated on the reservation, which had been shut in:

"The practice had been that [BLM], through some inspector, would state, would send us a certified letter and say what is your intentions to do with this well, or that you must repair A, B, C of this well within 30 or so many days, and we had to comply at that point" (Tr. 49). His testimony continued:

"Q. [by Murphy's attorney] As a result of those, was it your impressions or your assumptions that similar treatment would be accorded this well?

"A. Yes, sir, because I knew that I had some time frame that I had to get back into operation; I knew that. * * *

"I knew that I had to get the well on as short a time as possible, and at some point, I knew that I had to contact Mr. Reede back and tell Mr. Reede to fix it.

"Q. And that contact with Mr. Reede came approximately 30 days after the fire?

"A. Yes, sir. But I did not know the date of the fire, and that's what caused a lot of this problem."

(Tr. 49-50).

12/ Similarly, Hodge failed to report the treater fire, although it was his responsibility to do so, until BLM issued a "Notice of Incidents of Noncompliance."

13/ This is suggested by Hodge's statement, quoted in note 11, that he did not know when the fire had occurred.

As noted above, Hodge's initial report to BLM erroneously stated that the fire had occurred on Sept. 14, 1991. Both Hodge and Strauser testified that Strauser called Hodge on Sept. 3, 1991, to report the fire (Tr. 39, 191).

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Board finds that Citation failed to act as a prudent operator. Although Citation's apparent custom was to await such instructions from BLM, such a practice cannot be deemed an appropriate one for a prudent operator. Rather, a prudent operator would initiate repairs on its own without awaiting a notice of noncompliance or other direction from BLM.

Hodge was aware by September 21, 1991, at the latest, that he was going to have difficulty in engaging a pumper. He so informed Murphy on September 20 or 21, 1991 (Tr. 44-45). He was also aware, and apparently had been for some time, that Murphy was willing to take over as operator. 14/ Yet, although he apparently made no further efforts to hire a pumper, he waited until he received the Superintendent's October 1, 1991, letter, to ask Murphy to take over and make the repairs (Tr. 45). A prudent cperator, in the circumstances Citation found itself in on September 21, 1991, would either continue efforts to hire a pumper or ask Murphy to step in. A prudent operator would not cease all efforts to resume production until prodded into action by the next crisis. The Board finds that Citation did not act as a prudent operator during the period from September 21 through October 3, 1991.

Before reaching the ultimate question, the Board considers the additional factors cited by Judge Sweitzer as relevant to the inquiry here. In his recommended decision, he stated:

> An important consideration in determining whether the repairs and resumption of production were accomplished within a reasonable time is whether the Tribes unnecessarily lost revenues or their interests were otherwise unnecessarily harmed. The evidence shows that no significant harm to the Tribes has occurred.
>
> For instance, no drainage or change in the drainage boundary occurred during the cessation in production. Also, subsequent production at an average rate significantly higher than the rate prior to the cessation of production allowed the Tribes to recoup the revenue lost during cessation, except perhaps for a slight loss due to the time value of money. Finally, Murphy has operated the well since October 1991 in a responsible manner.

(Recommended Decision at 18-19).

The Tribes contend that "harm to the Tribes" is not relevant to the matter at issue here. Further, they contend that "[t]here is always harm when a trust lease is in the hands of an imprudent, unreliable and

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14/ Hodge testified:

"[H]istorically Mr. Reede has always said, since I have been up there, that if you ever want Murphy Oil to be the pumper, we will be glad to be the pumper -- to be the operator, excuse me, I'm sorry, I used the wrong word"
(Tr.44).

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financially incompetent operator; when a well is unnecessarily shut down" (Tribes' Exceptions at 14).

With respect to drainage, they contend:

> Whether or not the well is subject to drainage is not material. Murphy argues there was no drainage; that the oil remains in the ground, therefore no harm is done if it is not pumped. Carried to its extreme, Murphy's drainage test would wipe out the "as long as" clause. The lessee of a well free of drainage could produce at his pleasure. Further, the "drainage" view wholly overlooks the lessee's obligation to pay royalties currently, not at some unmeasured future date selected by the lessee who does not have the money to make the repairs.

(Tribes' Post-Hearing Brief at 7).

Murphy contended before Judge Sweitzer that "the issue of drainage is critical in determining the reasonableness of the appellants' actions in making timely repairs" (Murphy's Brief in Opposition to Area Director's Motion in Limine at 3). 15/ Murphy's witnesses testified that very little production was lost during the time the well was shut in; that when production resumed, it was higher than normal; and that the fact there was little or no, loss of production demonstrated that there was no drainage (Tr. 100-01, 117-20, 148-49). This testimony was not refuted.

Although he permitted testimony on drainage, Judge Sweitzer noted, with respect to Murphy's contention:

> Certainly, if drainage were occurring, that fact would favor unusually swift action by a lessee to achieve reasonable diligence in the repair of a malfunction and the resumption of production. On the other hand, the absence of drainage does not necessarily countenance anything other than the usual reasonable diligence.

(Order Denying Motion in Limine at 2).

The Board understands this statement to mean that, while the presence of drainage might increase an operator's responsibilities, the absence of drainage does not relieve an operator of its normal duty to proceed with diligence in making repairs and resuming production. 16/ The Board agrees.

15/ The Area Director, supported by the Tribes, filed a motion in limine before Judge Sweitzer, seeking to exclude evidence concerning drainage from the hearing on the grounds that it was irrelevant. Judge Sweitzer denied the motion. Both the Area Director and the Tribes renewed their objections at the hearing.

16/ As is apparent from the above-quoted portions of his recommended decision, Judge Sweitzer had somewhat altered his view by the time he wrote the decision.

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It observes however that, in this case, there was no showing that Citation knew whether or not drainage was occurring. 17/ If Citation had no knowledge concerning the drainage status of the Tribal 4-10 well, it is difficult to see how that status could have influenced its actions concerning repairs or the reasonableness of those actions.

In the body of law governing private oil and gas leasing, the absence of drainage has, at least on occasion, been cited as a reason for finding that a lease continued in effect despite a cessation of production. See 3 Williams and Meyers, aupra, § 604.4 n.11: "Among the circumstances which apparently have been given weight by courts in finding that a cessation of production was merely temporary are: * * * (b) absence of drainage. Stimson v. Tarrant, 132 F.2d 363 (9th Cir. 1942), cert. denied, 319 U.S. 751; Hoff v. Girdler Corp., 104 Colo. 56, 88 P.2d 100 (1939)."

In both cases cited by Williams and Meyers, the wells were shut in because of the lack of a market, and the courts noted that, if produced, the oil (Stimson) or gas (Hoff) would have had to be retained in artificial storage. Because there was no drainage, both courts deemed the oil or gas in situ to be in natural storage underground and found that such storage was of benefit to the lessor as well as the lessee. The court in Stimson noted: "[T]he storage of the oil underground was as effective as its storage in surface tanks, and obviously more economical" (132 F.2d at 365). See also Hoff, 88 P.2d at 103. Given the courts' analyses, neither Stimson nor Hoff is directly on point here because, in this case, there has always been a market for the oil and thus no need to store it either above or below ground.

The Board recognizes that the "temporary cessation" doctrine may sometimes, and in some contexts, allow for consideration of factors not directly related to the efforts of the lessee to resume production, such as the absence of drainage or the lack of significant harm to the lessor. 18/ It finds, however, for reasons discussed further below, that in the context of a mechanical breakdown or accident on an Indian oil and gas lease, these factors are peripheral at best.

The Board also finds that certain other factors cited by Judge Sweitzer, in particular, "the customary liberal attitude towards the effect of a temporary cessation of production" and "the harm to the lessees if the

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17/ As noted, the testimony on drainage was given by Murphy employees. There was no testimony from either Hodge or the Murphy witnesses that Citation was aware of the drainage status of the Tribal 4-10 well.

18/ The Board has not found much law on these points. With respect to drainage, Williams and Meyers cite only the two cases discussed above. Hemingway lists, as a factor considered by the courts, "lessor not being injured" but cites only Hoff in support of the statement and compares Elliot v. Crystal Springs Oil Co., 106 Kan. 248, 187 P. 692 (1920), a case in which a lease was cancelled because of a shut-in caused by lack of a market (Hemingway, supra, at 294 and n.56).

Neither Judge Sweitzer nor Murphy, in its filings before Judge Sweitzer cited any cases directly on point.

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lease is cancelled," are not relevant to the inquiry here. BIA's role here is that of a trustee for the Tribes. E.g., Mobil Oil Corp. v. Albuquerque Area Director, 18 IBIA 315, 329-31, 97 I.D. 215, 222-23 (1990), and cases cited therein. See also Cheyenne-Arapaho Tribes v. United States, 966 F.2d 583, 588-89 (10th Cir. 1992), cert. denied, 113 S. Ct. 1642 (1993). BIA's trust duty compels it to act in the best interest of the Tribes. E.g., Mobil, 18 IBIA at 330; Jicarilla Apache v. Supron, 728 F.2d 1555, 1567 (10th Cir. 1984), dissenting opinion adopted as majority opinion, 782 F.2d 855 (10th Cir.) (en banc), cert. denied, 479 U.S. 970 (1986). 19/ Under this standard, the interests of lessees in a case like this, and any benefits they might otherwise derive from "the customary liberal attitude towards the effect of a temporary cessation of production," are essentially irrelevant if they conflict with the best interest of the Indian lessors. In this case, it is evident that the lessees' interests are in conflict with what both BIA and the Tribes considered to be in the Tribes' best interest.

The temporary cessation doctrine was established for the benefit of lessees. 3 Williams and Meyers, supra, § 604.4 at 70. To the extent the doctrine benefits a lessee to the detriment of an Indian lessor, it is clearly an infringement upon the principles discussed in the preceding paragraph. It was for this reason that the Board was careful to limit its recognition of the doctrine in Citation I. The Board there stated:

> [T]he rules developed for non-Indian oil and gas leasing may not be applied mechanically to Indian oil and gas leases. Rather, such rules way be applied only where they are not inconsistent with the statutes governing oil and gas leasing of Indian lands and the fiduciary duty of the Department to act in the best interest of the Indian landowners.
>
> Guided by this standard, the Board concludes that there is no inherent incompatibility between the principles governing oil and gas leasing of Indian land and a practice which excuses a temporary shut-in, in the case of a mechanical breakdown or accident, to the extent reasonably necessary to make repairs. Further, such

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19/ In Jicarilla Apache the United States Court of Appeals for the Tenth Circuit held that, as between two reasonable royalty accounting methodologies, the Secretary must choose the one which serves the best interests of the Indians, despite the fact that the other methodology was "in conformance with the practices in the industry," 728 F. 2d at 1566, and despite the fact that the methodology which would benefit the Indians would work to the disadvantage of the lessees, 728 F.2d 1568-69. The court stated, in part:

"When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one 'reasonable' choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe. In short, he cannot escape his role as trustee by donning the mantle of administrator." (728 F.2d at 1567).

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> a practice is consistent with, and may be seen as authorized by, 25 CFR 211.19 and paragraph 3(f) of appellants' lease. [20/] (Citations omitted.]

(23 IBIA at 170). In its only other decision finding a valid reason for shut-in, Duncan Oil, Inc. v. Acting Navajo Area Director, 20 IBIA 131 (1991), the Board

> held that where an operator shuts in a well in the reasonable belief that a shut-in is necessary to avoid waste or damage to trust property, the lease does not expire. The holding in was based upon the lessee's obligation under the lease to have "due regard for the prevention of waste and the preservation and conservation of the property."

(23 IBIA at 168).

[3] To this point, in it determinations that certain shut-ins may be excused, the Board has not considered any factors other than those directly related to the actions of the operator. Where the cause of a shut-in is a mechanical breakdown or accident, this limitation seems particularly appropriate, because whether or not repairs are made in a reasonable time depends directly upon the actions, or lack thereof, of the operator. Factors such as the absence of drainage or lack of significant monetary loss to the Tribes normally have no directing on the reasonableness of a lessee's efforts to effect repairs. 21/ In the Board's view, they merely cloud the issue here.

The Board concludes that the proper approach is the one set out in Citation I, which directs the inquiry solely to the actions of the operator. This approach ensures certainty, both for the operator trying to avoid lease expiration and for BIA seeking to determine whether a lease has expired. Moreover, it is fair to the operator because it bases a determination as to the reasonableness of the operator's efforts to resume production upon those efforts. Most importantly, however, it is more commensurate with the Department's duty to act in the best interest of Indian lessors. It is not in the best interest of Indian lessors to excuse an operator's less than diligent efforts to resume production simply because, by geological happenstance, no drainage occurs during a period of shut-in. To the contrary, it is in the Indian lessors' best interest to

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20/ These regulatory and lease provisions, quoted in Citation I, 23 IBIA at 168 and n.8, set out the lessee's duty of diligence and establish standards of operation under the 1ease.

21/ It is conceivable that a prudent operator might base a reasoned decision concerning repairs upon what, in the context of this case, the Board finds to be peripheral matters. For instance, if an operator had two wells shut in at the same time, he might reasonably decide to repair one in which drainage was occurring before one in which no drainage was occurring. In such a case, the absence of drainage in the second well would be relevant to his actions concerning that well.

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encourage constant diligence on the part of lessees. Thus, even assuming it would be reasonable here to take these peripheral matters into consideration, the Board must choose the alternative approach, disallowing consideration of these factors, under the analysis in Jicarilla Apache Tribe.

The Board concludes that (1) the only factor relevant to the inquiry here is whether the treater was repaired and production resumed within a reasonable time; (2) whether Citation completed these tasks within a reasonable time must be determined by the time it would have taken a prudent operator of the same size and type to complete them; (3) a prudent operator of the size and type of Citation would not have taken 39 days to repair the treater and resume production and, in particular, under the facts known to Citation on September 21, 1991, would not have abandoned efforts to resume production but would have either continued its own efforts or asked Murphy to take over; and (4) Citation failed to repair the treater and resume production within a reasonable time.

Based on these conclusions, the Board rejects Judge Sweitzer's finding that the treater was repaired and production resumed within a reasonable period of time.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 8, 1992, decision issued by the Acting Billings Area Director is affirmed.

_____
Anita Vogt
Administrative Judge

I concur:

_____
Kathryn A. Lynn
Chief Administrative Judge

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